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DA 10-1241

In Reply Refer to:

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In re: **NCE MX Group 145**

NEW(NCE-FM), Clarksdale, MS
Quitman County Development Organization
d/b/a Deep South Delta Foundation
Facility ID No. 176186
File No. BNPED-20071022AHR

NEW(NCE-FM), Jonestown, MS
Blues and Gospel Heritage Association
Facility ID No. 177327
File No. BNPED-20071022AWT

Petition to Deny

Dear Counsel:

We have before us: (1) the referenced application of Quitman County Development Organization d/b/a Deep South Delta Foundation (“Quitman”) for a new noncommercial educational (“NCE”) FM station in Clarksdale, Mississippi; (2) the referenced application of Blues and Gospel Heritage Association (“BGHA”) for a new NCE FM station in Jonestown, Mississippi; (3) BGHA’s July 23, 2008, Petition to Deny (“Petition”) the Quitman application; and (4) related responsive pleadings.¹ For the reasons stated below, we deny the Petition, grant Quitman’s application, and dismiss BGHA’s application.

¹ Quitman filed a Motion for Extension of Time on August 26, 2008, and an Opposition to Petition to Deny on September 3, 2008 (“Opposition”).

Background. The Quitman and BGHA applications were mutually exclusive and were designated NCE MX Group 145. Pursuant to established procedures,² on June 23, 2008, the Media Bureau (“Bureau”) determined that the Quitman application³ was entitled to a decisive preference under Section 307(b) of the Communications Act of 1934, as amended (“Act”),⁴ because Quitman was the only applicant claiming to provide a first NCE aural service to (a) at least 10 percent of people residing within the station’s predicted 60 dBu service contour, and (b) to a minimum of 2,000 people.⁵ Thus, the *Tentative Selectee Order* identified Quitman as the tentative selectee in NCE Group 145, accepted for filing the Quitman Application, set a 30-day period for filing petitions to deny that application, and indicated that, if, after that 30-day petition period had run, there was no substantial and material question concerning the Quitman Application, it would, by *Public Notice*, dismiss the other mutually exclusive applications and grant the Quitman Application.⁶

BGHA filed a Petition to Deny the Quitman Application on July 23, 2008. In its Petition, BGHA makes three arguments. First, it argues that its application should have been preferred under Section 307(b) of the Act because it not only “provides a first NCE reception service” to “virtually the same area” as the Quitman Application, but it also proposes a first local transmission service to Jonestown, Mississippi.⁷ Next, BGHA argues that Quitman failed to submit documents “showing the basis of its calculations that the city of Clarksdale has no NCE reception service,” asserting that the projected 60 dBu contour of NCE Station WMAV(FM), Oxford, Mississippi, bisects Clarksdale. Finally, BGHA argues that Quitman failed to substantiate its claims that it has a local presence and has been an established local applicant for over 24 months prior to its application filing.⁸

In response, Quitman argues that BGHA’s pleading should be dismissed because it fails to cite any evidence in support of its claims. Quitman further points out that it was the only applicant to claim a 307(b) preference, and thus it was properly selected. Quitman also disputes BGHA’s claim that the staff erroneously selected Quitman’s application and maintains that it properly documented its qualifications.

Discussion. We will deny the Petition. BGHA argues that its application should have been preferred over Quitman’s because BGHA’s proposal would provide a first local transmission service to its proposed community of license.⁹ We disagree. In the *NCE Comparative MO&O*, the Commission specifically stated that it based NCE fair distribution analysis on new service received, not on first transmission service licensed to a particular community.¹⁰ Thus, BGHA’s assertion that its proposal

² See 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (“*NCE Comparative Order*”); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001) (“*NCE Comparative MO&O*”), *reversed in part on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

³ File No. BNPED-20071022AHR.

⁴ 47 U.S.C. § 307(b). A Section 307(b) analysis is ordinarily conducted at the staff level because the Bureau has delegated authority to make Section 307(b) determinations in NCE cases.

⁵ See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002(a); *Threshold Fair Distribution Analysis of 26 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 23 FCC Rcd 9934, 9940, ¶ 26 (MB 2008) (“*Tentative Selectee Order*”).

⁶ *Tentative Selectee Order*, 24 FCC Rcd at 9947, ¶56.

⁷ Quitman proposed a fourth local service to Clarksdale, Mississippi.

⁸ See Petition at 2.

⁹ See Petition at 1.

¹⁰ See *NCE Comparative MO&O* 16 FCC Rcd at 5089. As noted above, BGHA did not purport to provide a first or second reception service to the 60dBu area surrounding Jonestown.

should have been preferred because it would provide a first transmission service is inapposite. We also note that BGHA's argument is premised on the incorrect notion that it claimed eligibility for a fair distribution preference under Section 307(b) of the Act. Quitman correctly points out that BGHA answered both questions in Section III of the application, "No."¹¹ In so answering, BGHA certified that its proposed station would *not* provide a first or second NCE aural reception service at the minimum levels required to receive a threshold preference.

BGHA next argues that Quitman was not entitled to a Section 307(b) preference because Station WMAV(FM), Oxford, Mississippi, "bisects the city of Clarksville," and that Quitman failed to submit documentation showing the basis of its calculations.¹² An NCE applicant is required to provide a showing that its proposal will provide first or second NCE service to more than 10% of the population within its proposed 60dBu service contour, and to more than 2,000 persons.¹³ Quitman's application properly documented that it would reach a first-service population of 17,149 persons, just over 32% of the population within the predicted 60 dBu contour.¹⁴ The Bureau's independent engineering analysis confirms this. Accordingly, we find that the Commission properly held that Quitman was entitled to a fair distribution preference.

Finally, BGHA argues that because Quitman failed to provide documentation of its established local presence for a 24 month period prior to filing as required by Section IV of the Application, its application should have been denied.¹⁵ The "established local applicant" element is one of the four Section IV point system factors, which are used to select among mutually exclusive applicants if no applicant is selected on the threshold Section 307(b) factors. Because Quitman was selected based on the threshold Section 307(b) criteria, a comparative analysis based on points was not necessary in this case.¹⁶ Therefore, BGHA's argument is misplaced.

After reviewing all of the information, we find that BGHA has not raised a substantial and material question of fact regarding Quitman's application sufficient to warrant denial of its application. We therefore will deny the Petition and grant the Quitman Application. Moreover, we have examined the Quitman Application, and we find that it fully complies with all pertinent statutory and regulatory requirements and that grant of the application would further the public interest, convenience, and necessity.

Conclusion/Actions. Accordingly, IT IS ORDERED that the Petition to Deny filed by Blues and Gospel Heritage Association IS DENIED.

IT IS FURTHER ORDERED that the application of Blues and Gospel Heritage Association (File No. BNPED-20071022AWT) for a construction permit for a new noncommercial educational FM station in Jonestown, Mississippi, IS HEREBY DISMISSED.

¹¹ Opposition at 3.

¹² Petition at 3.

¹³ While the city of Clarksville is within the predicted 60 dBu contour of Quitman's proposed station, that community is not the relevant area to be considered under Section 307(b). Rather, the relevant area is the proposed station's predicted 60 dBu contour.

¹⁴ Opposition, Exhibit 1 at 9.

¹⁵ Petition at 3.

¹⁶ Quitman concedes that it did not provide copies of documents showing its status as a non-profit corporation since 1977, but notes that they are on file with the Mississippi Secretary of State. *See* Opposition to Petition to Deny at 6-7. We hereby take official notice of those records.

Finally, IT IS FURTHER ORDERED THAT the application of Quitman County Development Organization d/b/a Deep South Delta Foundation (File No. BNPED-20071022AHR) for construction permit for a new noncommercial educational FM station in Clarksdale, Mississippi, IS GRANTED subject to the condition that Quitman County Development Organization d/b/a Deep South Delta Foundation must operate technical facilities substantially as proposed for a period of four years of on-air operations.¹⁷

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Quitman County Development Organization
Blues and Gospel Heritage Association

¹⁷ See 47 C.F.R. § 73.7002(c).